

No. 11,154

IN THE
United States Circuit Court of Appeals
For the Ninth Circuit

FRANK M. WEBER,

Appellant,

vs.

EVA M. WELLS, OGLA K. NEWPORT, ERNEST
H. KREYENHAGEN, JENNIE MAY MERRILL
MILLER, ALMA H. SILVA, LILLIAN ARNEY,
LOWELL HERIFORD, WALTER MERRILL and
PAUL MERRILL,

Appellees.

Upon Appeal from the District Court of the United States for
the Northern District of California, Southern Division.

APPELLANT'S OPENING BRIEF.

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PAUL P. O'BRIEN,
CLERK

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APPELLANT'S OPENING BRIEF.

OPINION.

The District Court did not write an opinion. No
legal or other reason was given by the District Court
in support of its judgment.

JURISDICTION.

This is an appeal from the judgment of the District Court awarding to appellees the sum of \$2600.00 less the sum of \$242.46 as compensation for Lot 9 in Block 4611 and Lot 11 in Block 4616, and against appellant declaring that he has no right, title or interest in or to said funds or any part thereof and that he is not entitled to any sum of money by reason of the taking of said property. (R. 68-70.) Notice of appeal was filed July 11, 1945. (R. 70-71.) The jurisdiction of the District Court was invoked under the Act of Congress approved July 19, 1940 (Public Law No. 757, 76th Congress, 3rd Session) and the Second War Powers Act of 1942 (S. 2208, 77th Congress, 2nd Session). (R. 8.) The jurisdiction of this Court is invoked under Section 128 of the Judicial Code, as amended, 28 U. S. C. sec. 225 (a).

QUESTION PRESENTED.

The sole question involved in this appeal is, who is entitled to the compensation for Lot 9 in Block 4611 and Lot 11 in Block 4616; the appellant as purchaser at a tax sale, who acquired the tax deed after title to the property vested in the United States by condemnation or appellees as the former owners of the property.

STATEMENT OF FACTS.

This condemnation proceeding was commenced on April 4, 1942 by filing of the Government's complaint to condemn 230.5 acres of land at the Naval Dry Dock, Hunter's Point, San Francisco, California. (R. 1-15.) An order of immediate possession was obtained on the same day. (R. 15-18.) A declaration of taking was signed on April 15, 1942, pursuant to the Act of February 26, 1931, C. 307, 46 Stat. 1421, 40 U. S. C. sec. 258a. (R. 19-31.) On April 22, 1942, an *ex parte* judgment was entered declaring that the United States was entitled to acquire the property for the purposes stated and ordering immediate delivery of possession. (R. 32-36.) Thereafter, on August 6, 1942, appellant filed his answer herein. (R. 48-49.) On December 12, 1942, an amended declaration of taking was filed. (R. 37-47.) On November 22, 1943 appellant filed his notice of motion for payment to him on account of compensation the sum of \$1950.00, being the amount then on deposit in the District Court as compensation for the parcels of land described as Lot 9 in Block 4611 and Lot 11 in Block 4616. At the same time, appellant filed his affidavit in support of such motion and also his points and authorities in support of such motion. (R. 55-60.) On January 6, 1944, appellees filed their answer herein. (R. 50-55.) On February 7, 1944, Honorable Michael J. Roche filed herein his formal order denying appellant's motion for payment to him of said money. (R. 60.)

From the uncontradicted affidavit of appellant in support of his said motion (R. 56-58) and from the

evidence offered and received at the trial of this cause on February 28, 1945 (R. 84-96), it appears that the appellees having failed and neglected to pay the general taxes for municipal and state purposes for the year 1936, which were levied and assessed on said parcels of land herein referred to, and said taxes having become delinquent, said property was sold to the State of California on the 25th day of June, 1937, pursuant to Section 3771 of the Political Code of the State of California. That thereafter, general taxes for the years 1937, 1938, 1939, 1940 and 1941 which were levied and assessed on said property having likewise become delinquent, said property was sold at public auction to this appellant on the 1st day of July, 1942, pursuant to the provisions of Section 3771a of the Political Code of the State of California. That on July 14, 1942, in accordance with the provisions of the Political Code and Revenue and Taxation Code of the State of California, Edward F. Bryant as Tax Collector of the City and County of San Francisco, State of California, made, executed and delivered to appellant two separate deeds to the property herein referred to. That on July 21, 1942, said deeds were duly and regularly recorded in the office of the Recorder of the City and County of San Francisco, State of California. (R. 88-93.) That on said 21st day of July, 1942, appellant paid to the City and County of San Francisco all delinquent taxes which were levied and assessed on said property for the years 1937, 1938, 1939, 1940 and 1941. (R. 94-96.)

SPECIFICATIONS OF ERRORS.

The District Court erred (R. 76-78):

1. In awarding to appellees the sum of \$2600.00 less the sum of \$242.46 due the City and County of San Francisco, State of California for taxes due, payable and delinquent against Lot 9 in Block 4611 and Lot 11 in Block 4616 as described in the declaration of taking on file herein.
2. In holding that appellant had no right, title or interest in or to said sum of \$2600.00 or any part thereof, and is not entitled to any sum of money as compensation by reason of the taking of said property by the Government.
3. In holding that the defendant Paul Merrill was entitled to 9-2/3/70th of said sum of \$2600.00 or any part or portion thereof.
4. In holding that the sum of \$242.46 was due the City and County of San Francisco, State of California.
5. In holding null and void the tax sale and tax deeds to appellant covering said parcels of land designated as Lot 9 in Block 4611 and Lot 11 in Block 4616 in the declaration of taking on file herein.
6. In holding that this condemnation action extended the statutory time for redemption by appellees beyond the five year period as provided by the law of the State of California.

INTRODUCTION.

Before entering upon a discussion and analysis of the law applicable to this case, we believe a brief resumé of the California law pertaining to the sale of real property for delinquent taxes is appropriate.

When taxes upon real property first become delinquent, the property owner is notified thereof by registered mail at his last known address as appearing on the assessment roll. The list of all tax-delinquent property in the county in which such real property is situate is then published in a newspaper of general circulation printed and published in such county. Such list also contains a notice setting forth a date, hour and place when and where such tax-delinquent property will be sold to the State of California for such delinquency. Thereupon and on the date set for said sale all tax-delinquent property not theretofore redeemed, is sold to the State of California pursuant to Section 3771 of the Political Code of the State of California. Thereafter, the property owner has five years to redeem from such sale. In the event the property owner fails to redeem during said five-year period, the property is then sold and deeded to a purchaser pursuant to Section 3771a of the Political Code of the State of California. In the case at bar, it was after the appellees Eva M. Wells, et al., had failed to redeem for a period of five years, that the property was sold to this appellant by the State of California pursuant to the provisions of said Section 3771a of the Political Code.

Section 3771 of the Political Code provides in part as follows:

“On the day and hour fixed for the sale in the delinquent tax list, all property upon which the taxes and assessments of all kinds, penalties and interest have not been fully paid, * * * shall by operation of law and the declaration of the tax collector, be sold to the State, and said tax collector shall make in appropriate columns on the delinquent list, ‘Sold To The State’ * * *.”

Section 3771a of the Political Code provides in part as follows:

“On the day and hour fixed for the sale in accordance with subdivision 2 of Section 3764 of this code, all property which has not been redeemed from the sale to the state or the sale thereof cancelled, *shall be sold by the tax collector at public auction to the highest bidder for cash in lawful money of the United States * * *.*

*After such bid has been made and accepted, the right of redemption shall cease * * *.”*

ARGUMENT.

THE LIEN FOR THE GENERAL TAXES LEVIED AND ASSESSED AGAINST SAID PROPERTY FOR THE FULL FIVE YEAR PERIOD WAS A GOOD AND VALID LIEN.

The property was first sold to the State of California on June 25, 1937, pursuant to Section 3771 of the Political Code above quoted, for delinquent taxes for the year 1936. Thereafter, appellees had five years to redeem from said sale, as provided by Section

3771a of said Political Code. Appellees also failed and neglected to pay the general taxes levied and assessed against said property for all years after 1936, to and including the year 1941. The taxes for each year after 1936 became a lien on the property on the first Monday in March of such year and the taxes for the last year of 1941 became a lien on the property on the first Monday in March, 1942, and prior to the commencement of this condemnation action on April 4, 1942. Therefore, the delinquent taxes for the full five-year period and for which the property was sold to appellant, were levied, assessed and liened on said property while title thereto was in appellees and prior to the time title thereto vested in the Government by reason of this condemnation action.

As to when general taxes become a lien upon real property, see Section 3718 of the Political Code of the State of California, which provides in part as follows:

“Every tax due upon real property is a lien against the property assessed; and every tax upon improvements upon real estate assessed to others than the owner of the real estate, is a lien upon the land and improvements; * * * *which several liens attach as of the first Monday in March of each year.*”

See also, Section 2192 of the Revenue and Taxation Code of the State of California, which provides as follows:

“*All tax liens attach annually as of noon on the first Monday in March preceding the fiscal year for which the taxes are levied.*”

See also the case of *City of Santa Monica v. Los Angeles County*, 15 Cal. App. 710, which was an action brought by the City of Santa Monica to recover taxes paid under protest. The property assessed was privately owned on March 1, 1903. Thereafter, but before such assessment was levied, the City of Santa Monica acquired said property. The Court held with the defendant in said action that the lien of said taxes attached on the first Monday of March of said year and that

“The plaintiff, when it acquired this land, took it subject to the lien for county taxes to the same extent as would a private individual.”

See also the case of *United States v. Certain Parcels of Land in the City of San Diego*, 44 Federal Supplement 936, decided May 15, 1942, at page 939, where the Court said:

“The tax lien having attached to the property on the first day of March, 1941, is a fixed liability as of the first Monday of March, 1941, and attaches as a lien, and this lien is transferred to the award, and must be deducted from the awards to the several parcels.”

THIS CONDEMNATION ACTION DID NOT EXTEND THE STATUTORY TIME FOR REDEMPTION BY APPELLEES BEYOND THE FIVE-YEAR PERIOD AS PROVIDED BY THE LAW OF THE STATE OF CALIFORNIA.

It is clear that appellant is the owner of the property and consequently of the award unless the sale to him has been redeemed both as a matter of fact,

or as a matter of law. Admittedly, no redemption has been made or attempted in fact pursuant to the statute. Can the condemnation be considered as a redemption in law on the supposition that the award would very likely be greater than the amount required for redemption? On principle, it would seem that there would be no redemption because that right is a statutory privilege and must be exercised strictly in accordance with statute.

The right of redemption is strictly statutory and is subject to all the limitations and conditions therein imposed.

Cooley on Taxation, Fourth Edition, Section 1564.

“Time for redemption. Redemption, to be effective, must be made within the time specified in the governing statute, unless otherwise agreed upon by the parties; and circumstances of excuse, like the prevalence of civil war, cannot enlarge the time when the statute does not provide for it * * *.”

Lachmund v. Johnson, 47 Cal. App. (2d) 377, at page 379.

“It is undoubtedly true that ‘The right of redemption comes entirely from the statute, and it is subject to all the limitations and conditions therein imposed’, Quinn v. Kenney, 47 Cal. 147 at 150, and that it is ‘competent for the legislature to fix the precise terms upon which the owner may be entitled to have his property restored to him’. Anderson Co. v. Los Angeles County, 55 Cal. App. 585 at 587, 203 Pac. 1040.”

Sutter-Yuba Invest. Co. v. Waste, 21 Cal. (2d) 781 at 785.

“As this court said in *Palomares Land Co. v. Los Angeles County*, 146 Cal. 530, 80 Pac. 931 at 933, ‘the provisions of the law authorizing redemption, Political Code Sec. 3817, are to be regarded simply as an offer by the state to release its claims to the land sold upon the terms proposed’. There is no constitutional right to redeem property that has been sold to the state for the nonpayment of taxes. ‘The right of redemption comes entirely from the statute, and is subject to all the limitations and conditions therein imposed.’ *Quinn v. Kenney*, 47 Cal. 147.”

It is appellant’s contention that on July 1, 1942, when the bid of appellant was accepted at public auction, the right of redemption residing in the appellees terminated and ceased.

See Section 3771a of the Political Code of the State of California which provides in part as follows:

“*After such bid has been made and accepted, the right of redemption shall cease * * *.*”

See also the case of *United States v. Certain Lands in the Town of Hempstead*, 129 Federal (2d) 918, where the Court said:

“*Condemnation should not extend the statutory period of redemption any more than it should obliterate the effect of the expiration of the period. The right of redemption from a tax sale can be exercised only in the manner permitted by statute.*”

It is axiomatic that the award takes the place of the land and is a substitute therefor. It has been said that condemnation is an involuntary sale. The right to possession of the award by appellant becomes absolute where there has been a failure of redemption in the manner prescribed by statute.

To hold that the Court could pay the appellant the amount of the tax sale after the period of redemption had expired, would be making the Federal Court a court of appeals and extending the period of redemption beyond the statutory period. This court has no right to do so. This would be an invasion of property rights that are vested and fixed by statute.

Remember the owner failed in his duty to redeem. There must be a fault before there can be a default. Should the purchaser at a tax sale be punished while the owner benefits by delaying? Can he by his own malfeasance extend his own time to redeem?

**APPELLANT IS ENTITLED TO THE COMPENSATION
AND AWARD FOR SAID PROPERTY.**

It was appellees' contention in the District Court that as title to the property passed to the United States on April 22, 1942, by reason of the judgment filed herein on said date, the subsequent tax sale to appellant on July 1, 1942, was therefore null and void.

It is appellant's contention that the tax sale is not void merely because it failed to convey title to the property which was in the United States at the time

of such sale. The tax deeds being ineffectual to pass title to the property, conveyed to appellant the right to the compensation for the property so taken by the United States. The condemnation award stands as a substitute for the land; and the subsequently executed tax deeds to appellant, since they could not convey title to the land, carried the right to the award.

The case of *United States v. Certain Lands in the Town of Hempstead*, 129 Federal (2d) 918, decided July 21, 1942, is identical on all fours to the facts of the case at bar. The *Hempstead* case was decided by the Circuit Court of Appeals of the State of New York and reversed the decision of the District Court of the United States of the District of New York. The case of *United States v. Certain Lands in the Town of Hempstead* reads as follows:

“This proceeding was commenced by the United States in July, 1937, to acquire for military purposes several parcels of land, including one known as ‘damage parcel 121’ and alleged to be owned by Boris and Molly Kramer. The district Court appointed appraisal commissioners who awarded the sum of \$558 as just compensation for parcel 121, and this sum was deposited in court on November 30, 1939. Title to the premises thereupon vested in the United States. In July, 1936, the property had been sold to the County of Nassau for 1934 taxes. The period for redemption from such sale was four years. The Kramers, who reside in Palestine, neither redeemed from the tax sale during that period nor applied at any time for payment of the condemnation award on deposit in the district court. On February 6, 1941,

the County received a tax deed to the premises and a month later applied to the court for payment to it of the entire award. The Kramers did not appear in the proceeding and the court directed counsel for the United States to examine into the facts and report to it as *amicus curiae*. Thereafter, on October 2, 1941, an order was entered directing payment to the county of the taxes, interest and penalties due on November 30, 1939, amounting to \$110.52, and payment of the balance of the award to the Kramers. From this order the county appealed. The question presented lies within narrow compass: *It is whether a purchaser at a tax sale, who acquires the tax deed after the title to the premises has vested in the United States by condemnation, is entitled to the entire award.* In our opinion the answer must be in the affirmative.

If the period of redemption had expired before the condemnor acquired title, it could scarcely be doubted that a subsequently executed tax deed would carry the right to the award.

In the case at bar the period of redemption had not expired before title vested in the United States, but we see no reason why this should necessitate a different result. Condemnation should not extend the statutory period of redemption any more than it should obliterate the effect of the expiration of that period. The right to redeem from a tax sale can be exercised only in the manner permitted by statute. Condemnation should affect the rights of parties having interests in respect to land taken only so far as necessary to assure the sovereign's title. * * Since the award takes the place of the land it is reason-*

*able to require the owner to redeem in order to obtain the award, just as he would have to do to recover the land, had condemnation not intervened. If the rule were otherwise the inequitable result would be that the former owner could reserve his privilege to redeem until he learned whether the award would be greater or less than the sum required to exercise the privilege. * * **

Finally, it may be noted that the Kramers could have applied to the court to withdraw the deposit or part thereof, and could thereby have obtained the funds with which to redeem the tax sale certificate before the expiration of the period of redemption. As this did not occur, we think the tax deed was effective to carry the right to the entire award."

The judgment of the District Court is erroneous in two additional particulars:

1. The judgment provides that Paul Merrill is entitled to 9-2/3/70th of the sum of \$2600.00 less the sum of \$242.46.

In this connection, Paul Merrill has not even appeared in this case. There is no pleading on file in this cause on his behalf. Paul Merrill was not represented at the trial of this case or any other step in the proceedings herein. Yet the judgment herein provides for payment to him of 9-2/3/70th of the sum of \$2600.00 less the sum of \$242.46.

2. The judgment provides that there is due the City and County of San Francisco the sum of \$242.46.

This is directly contrary to the evidence in this case. The uncontradicted evidence in this case shows

that on July 21, 1942, this appellant had paid said City and County of San Francisco said sum of \$242.46 and more, as and for delinquent taxes on said property.

We also wish to call the attention of this Court to that principle of law that where the validity of the proceedings, upon which a tax title is dependent is in question, the presumption is always in favor of the regularity, and not against the regularity. This principle is laid down definitely by the Code of Civil Procedure of the State of California. Section 1963, subdivision 15 provides as follows:

“That official duty has been regularly performed.”

Not only that, but the Supreme Court of the State of California has so held in numerous instances, to-wit:

Western Union Telegraph Co. v. Los Angeles,

160 Cal. 124 at page 126,

where the Court said:

“It cannot be doubted that the presumption is always in favor of the validity of an assessment, and that the burden of showing the contrary is on the person claiming to be aggrieved. Independent of special statutory provisions relative to presumptions in favor of assessments, *the general presumption that public officers have regularly performed their duties and that official duty has been regularly performed (Code Civ. Proc. Subd. 15, Section 1963), applies to official action in tax matters. The presumption in all proceedings relating to taxes is in favor of regularity.*”

See, also, the case of

Davis v. Pacific Improvement Co., 137 Cal. 245,
at page 250,

where the Supreme Court of the State of California said:

“The rule at one time prevailed, requiring the claimant under a tax deed to make strict proof and exact proof of every step to be taken in the proceeding under which the property was sold, has been greatly relaxed by modern legislation, and the speculative nature of purchases at tax sales has been thereby removed. Such legislation in this state is shown by the provisions of the Political Code making the deed *prima facie* evidence of all acts necessary for acquiring jurisdiction to make the sale, and conclusive as to all proceedings taken in the exercise of the jurisdiction thus acquired, and also by the provision in Section 3883 that no ‘Informality’ in any act relating to the assessment or collection of taxes shall render the tax illegal. The duty of the owner of land to pay taxes therein and the right of the state to enforce their collection is not changed, but *the inducement that under the former system was held out to the owner not to pay the taxes, in the hope that some trifling and immaterial defect in the proceedings might be shown to defeat the effect of the sale, has been taken away.*”

Why shouldn’t a person, when the owner negligently fails to perform his duty, be protected by the law in the investment of his money? Why shouldn’t the state stand behind the title it issues? How is the state to raise money for taxes upon the sales of prop-

erty for delinquent taxes, if it holds out to the world that the title which the state issues to a purchaser is not worth the paper on which it is written? If this is the law, then every person who owns property may as well cease paying taxes on his property. If our courts are going to hold that the state cannot make a valid sale of property for taxes, why pay taxes at all? The courts of this day and time are unanimous in holding that it is the first civic duty of a citizen to pay his taxes. Why shouldn't the man who fails to perform that duty suffer in preference to the tax purchaser, who advances the money to the state with which to pay the expenses of the state?

By the negligence of the property owner his property is sold. Why should the property owner who is guilty of negligence recover his property? Is this equity? We think not. The negligence of the property owner caused the sale. The law aides the diligent only. Where one of two innocent persons must suffer by the act of a third person, he whose negligence caused the loss must suffer.

CONCLUSION.

It is respectfully submitted that the judgment of the District Court should be reversed.

Dated, San Francisco,
January 21, 1946.

MATHEW WEBER,

Attorney for Appellant.